1968

Dale W. Demille, Administrator Of The Estate Of Terry Lee Demille And Constance Hope Demille, Also Known As Connie Demille, Decease v. Phyllis Erickson, Administratrix Of The Estate Of Frederick Kenneth Spendlove, Deceased : Brief of Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

DALE W. DeMILLE,
Administrator of the Estate
of Terry Lee DeMille and
Constance Hope DeMille,
also known as Connie DeMille,
deceased,

Plaintiff and Respondent,

-vs-

PHYLLIS ERICKSON,
Administratrix of the Estate of
Frederick Kenneth Spendlove,
deceased,

Defendant and Appellant.

Case No. 11,385

BRIEF OF APPELLANT

Appeal from judgment of the Fifth Judicial District Court for Iron County, Honorable C, Nelson Day, *Judge*

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STATEMENT OF KIND OF CASE

This is an action brought by Dale W. DeMille as Administrator of the Estate of Terry DeMille and Constance DeMille to recover damages for their alleged wrongful death from the defendant, Phyllis Erickson, Administratrix of the Estate of Frederick Kenneth Spendlove. The action arose out of an automobile accident which occurred in Iron County on the 11th day of August, 1965, in which Terry DeMille, Constance Hope DeMille and Frederick Kenneth Spendlove were killed.

DISPOSITION IN THE LOWER COURT

The case was tried to a jury before the Honorable C. Nelson Day in the District Court in and for Iron County. At the close of the evidence, both parties made motions for directed verdicts. The court ruled that the plaintiff could not recover for the wrongful death of Terry Lee DeMille on the ground that he was negligent as a matter of law in the operation of his vehicle at the time and place of the accident in question and that his negligence was a contributing and proximate cause of his own death. The court denied the motions for directed verdicts in the action brought for the alleged wrongful death of Constance Hope DeMille.

The court submitted the case to the jury under an instruction (Instruction 24), which contained five separate issues of negligence on the part of Frederick Kenneth Spendlove, the driver of the other automobile: that he failed to maintain a proper lookout; failed to keep the car under reasonably safe and proper control; failed to drive as nearly as practical entirely within a single lane and not to move from one lane to another; failed to keep his automobile on his own right side of the highway; and failed to turn his vehicle to the outside of the highway to avoid a collision. Appellant objected to this instruction on the grounds there was no evidence of negligence on the part of Frederick Kenneth Spendlove and that in the absence of such evidence he was entitled to a presumption that he was using due care. The jury re-

solved the issues in favor of the plaintiff and rendered a judgment in the amount of $23,000.00 which was entered by the court.

RELIEF SOUGHT ON APPEAL

Appellant, Phyllis Erickson, Administratrix of the Estate of Frederick Kenneth Spendlove, seeks a reversal of the judgment entered in the lower court or in the alternative a new trial.

STATEMENT OF FACTS

The facts in this case indicate that the deceaseds, Terry Lee DeMille and Constance Hope DeMille, were husband and wife (TR. 6). They resided in Cedar City, Utah (TR. 8). Approximately one week prior to the accident, Terry had been laid off from his work at the Webster Coal Company. On the day of the accident, August 11, 1965, he was on his way to see about a job in Las Vegas, Nevada (TR. 13). Terry and his wife were seen at a service station in Cedar City the morning of the accident between 6:30 and 6:40 a.m. (TR. 15). At that time Terry was sitting in the driver's seat of a Chevrolet automobile and his wife was in the front seat on the right side (TR. 16). They were next seen at the scene of the accident just south of Kanarraville, Utah, or approximately 13 or 14 miles south of Cedar City (TR. 17).

At 6:55 a.m. Officer William R. Burch of the Utah Highway Patrol received a call reporting an automobile accident just south of Kanarraville, Utah. He immediately drove to the scene of the accident,

arriving at 7:05 a.m. He was the first officer to arrive on the scene which was about a mile south of Kanarraville, Utah, on Highway 91. This was the highway in normal use between points to the south of Cedar City. At the time the freeway had not been opened to the public (TR. 24). He first checked the people who had been involved in the accident and identified a 1962 Volkswagen. There were two people lying near this vehicle later identified as Frederick Kenneth Spendlove and a Mr. Condie. Both in his opinion were dead (TR. 25). He then identified a Chevrolet automobile in which there was a man and woman, later identified as Terry DeMille and his wife Constance DeMille (TR. 26). In his opinion Terry DeMille was still breathing at the time but expired shortly thereafter (TR. 26). He called for assistance and an ambulance and then proceeded to make his investigation which can best be understood by referring to Exhibits No. 5 and 6, which we have reproduced and which appear on the following pages of this brief. Exhibit 5 is a diagram of the scene of the accident and Exhibit 6 is a photograph of the same area.

The highway extends in a generally north and south direction. The overall width of the highway was 31 feet (TR. 27). It was marked by a dotted or dashed white line down the approximate center of the highway. The distance from the center of the highway to the east edge of the highway was 16 feet 4 inches (TR. 29). There was a solid yellow line in

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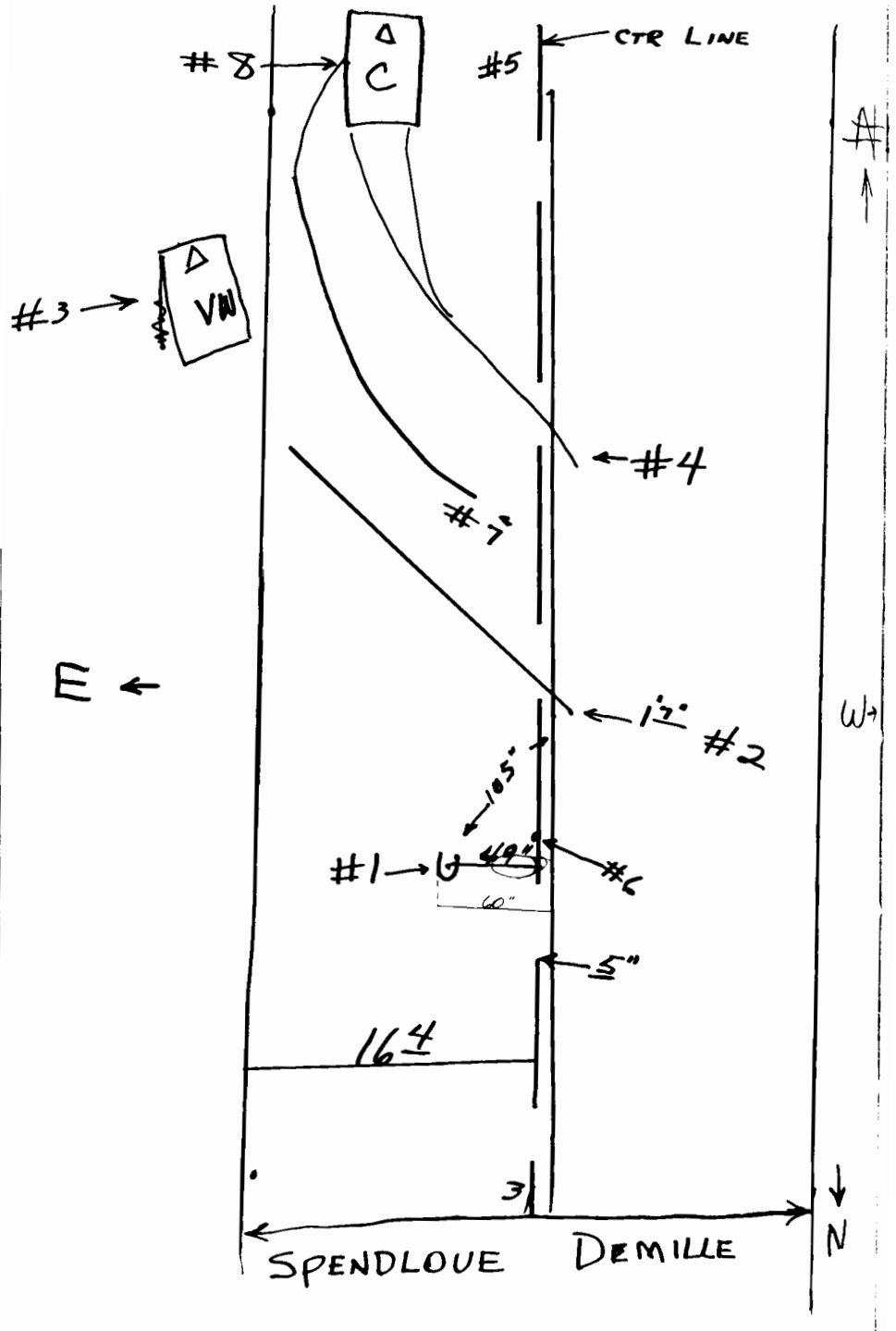
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the south bond lane of traffic west of the dotted or dashed white line (TR. 30). The Volkswagen automobile ended up off of the east side of the road in the position illustrated as point No. 3 on Exhibit 5 and 6. To the north of these vehicles various skid marks, scrapes and gouges felt to be of critical importance in reconstructing the accident were found. The farthest mark north in the north bound lane of traffic was a rubber scuff mark about 20 inches in diameter. The outside edge of this mark was 60 inches east of the white line. The center of this mark was 49 inches east of the white line (TR. 32, 33).

Between the mark identified as point No. 1 and the white line down the center of the highway there were a number of gouge marks. One of these, the one that is closest to the center line, was identified on Exhibits 5 and 6 as point No. 6. This mark was approximately 18 inches south of the mark found at point No. 1 (TR. 93) and approximately 2½ inches east of the white line (TR. 54). This mark in the opinion of Officer Burch was made by some metal part of the Volkswagen, probably the left front wheel (TR. 93). In the opinion of Officer Reed it was made by the collapsation of the undercarriage of the front left of the Volkswagen (TR. 169) which would include the axles, shock absorbers, and the wheels (TR. 173, 174). Approximately 105 inches south of point No. 1 a rubber skid mark was found leading diagon-

ally off to the east side of the road to the final resting place of the Volkswagen (TR. 36, 37) which came to rest at the point illustrated on Exhibits 5 and 6 as point No. 3. This mark in the opinion of Officer Burch was made by one of the rear tires of the Volkswagen prior to the time it left the road (TR. 85). On the east edge of the highway near point No. 3 there were scuff or tire marks made by the underpart of the Volkswagen automobile as it left the highway (TR. 137). Further south and beginning at what has been shown as point No. 7 on Exhibit 5 and leading to the right front of the Chevrolet automobile which has been shown as point No. 8 on Exhibit 5 there was a mark extending in a circular fashion (TR. 74). To the south of this mark being at a point identified as point No. 4 on Exhibits 5 and 6 and leading to the Chevrolet automobile which has been identified as point No. 5, there were two rubber skid marks which begin near the center of the road (TR. 45) and lead up to the Chevrolet (TR. 40). All of the marks found by the officers were on the east side of the highway with the exception of the marks running from point No. 2 to 3 which start on the west side near the center of the road (TR. 76). There is an oil slick in the vicinity of point No. 6 which the officers said had nothing to do with this accident (TR. 78). There appear to be some blotches or blotchy areas on the west side of the highway which according to the officers do not tie in or have anything to do with this accident (TR. 78).

A car going south from Cedar City would be on the west side of the highway and a car going north or towards Cedar City would be on the east side of the highway (TR. 76). The front end of the Chevrolet automobile was extensively damaged (see plaintiff's Exhibit No. 12 and defendant's Exhibit No. 3). The front of the Volkswagen automobile was practically obliterated (see plaintiff's Exhibit No. 11). The point of maximum engagement on the front of the Chevrolet automobile was from a little bit right of the center of the automobile to the left side of the car (TR. 95), an area of approximately four feet in length (TR. 96).

The area where the impact between the two automobiles occurred was identified on Exhibit 5 by the red circle drawn in the area which was previously identified as point No. 6. Actually point No. 6 is in the opinion of Officer Reed, one of the investigating officers, anywhere from six inches to two feet from the point where the automobiles first came together. Other than the foregoing physical facts, there is no evidence in the record as to what the drivers of the two vehicles were doing at the time of the accident, whether they saw one another, the speed at which they were driving, what evasive action they may or may not have taken prior to the accident, or any other information as to how the accident in this case may have occurred.

Based on these physical facts and the inference that the DeMille car was travelling south, since it

was travelling away from Cedar City, the two highway patrolmen who testified in the case, William R. Burch and Robert J. Reed, both of whom were called by the plaintiff, attempted to reconstruct the accident and arrived at certain conclusions. Based on the gouge marks, the area designated as the point of impact, the damage to the front end of the Volkswagen, and the damage to the front end of the Chevrolet automobile, Officer Burch testified that in his opinion the DeMille or Chevrolet automobile was about three to four feet across the white line into the north bound lane of traffic at the time of the impact (TR. 97). He further testified that the 1962 Volkswagen automobile had an overall width from one side to the other of sixty inches and a width from the outside of the tire on the right to the outside of the tire on the left of 56 inches (TR. 54), so that on each side beyond the outer rim of the tire there would be two inches to the outside skirt of the car. The 1962 Volkswagen weighed approximately 1800 pounds. The Chevrolet automobile had an overall weight of between 3,500 and 4,000 pounds. He further testified that on the basis of the physical evidence which he found at the scene of the accident, the Volkswagen automobile would be 2½ inches east of the center of the white line (TR. 90) and that he found no evidence whatsoever indicating that the Volkwagen or Spendlove vehicle ever got onto the wrong side of the road. He stated that as the two automobiles came together the left side of the Chevrolet automobile came up over

the Volkwagen. At that point the rear of the Chevrolet automobile swung in a counter-clockwise direction to the west side of the road and continued on around until it came to the point indicated as point No. 4 where the rear wheels engaged the highway. At this point the front of the Chevrolet automobile starts to swing in a clockwise direction, the right front wheel of the car engaging the highway at point No. 7 and making the marks shown on the exhibits between point No. 7 and No. 8, the vehicle coming to rest with the front end again facing toward the south (TR. 101). At the same time the front end of the Volkswagen was forced down onto the highway making the marks shown on Exhibits 5 and 6 as points 1 and 6. At that point the front end of the Volkswagen was facing toward the center of the road. The rear of the Volkswagen then moved in a counter-clockwise direction towards the east, the north, the west, and back to the south making almost a 180° circle to where the rear of the Volkswagen engaged the road at point No. 2 on Exhibit 5 and 6 (TR. 180, 101, 108). At that point the rear wheels of the automobile, and the Volkswagen skidded around in a clockwise direction making the scuff marks on the edge of the road in the area near point No. 3 and came to rest with the front of the Volkswagen pointing in a southeast direction at point No. 3 (TR. 127 through 129).

One of the contentions of the plaintiff is that the mark shown at point No. 2 which is one foot seven inches onto the west side of the road was made by the

Volkswagen automobile at the time of impact and illustrates that it was on the wrong side of the road at that time and that this mark was made by the rear of the Volkswagen automobile as it was simply pushed off of the road. Referring to the mark leading from point No. 2 to 3 (TR. 133), the officer was asked:

"Q. Now, counsel has asked you, could this have been made by the car being pushed sideways off the road, and your answer to that is yes, it could have been so made, possibility?

A. Yes.

Q. But that is not your opinion as to how it was made?

A. No." (TR. 134)

And again on page 135 of the transcript the officer was asked:

"Q. Let me ask you this, in the realm of possibilities: Assume that this tire was left—well, let me put it this way, assume that when the car was forced to the ground, one wheel was there (indicating) and one wheel was there, (indicating) is there any possibility, then, that that car, that the left rear of that car could have made that tire mark as it went off the road; if we assume we started with the car hitting the ground, the wheels hitting the ground in that position (indicating) and then being forced off the road, is there any possibility that that mark could have been made by the left rear wheels of the tires

when it was forced off the road?
A. No."

Both officers concurred in their analysis of how the Volkswagen swung around first to the east, then the north, west, and then south in a counter-clockwise direction (TR. 101, 180).

POINT I
THE COURT ERRED IN FAILING TO DIRECT A VERDICT IN FAVOR OF THE DEFENDANT

It has already been shown that there was no evidence produced at the trial relative to the acts and conduct of the deceased, Frederick Kenneth Spendlove, immediately before the collision. Except for the fact that Terry Lee DeMille and Constance DeMille were seen in Cedar City fifteen to twenty minutes prior to the accident and were then intending to go to Las Vegas, Nevada, nothing is known concerning the events leading up to the collision. All of the persons involved in the collision were killed, and there were no eye witnesses.

Where there are no eye witnesses or other evidence of negligence on the part of the deceased, the general rule is stated in Blashfield Automobile Law And Practice, Section 417.2, Volume 11, as follows:

> "In the absence of any evidence as to the conduct of deceased, in most jurisdictions, in view of the instinct of self-preservation, there is a presumption that the deceased, whether an adult or a minor, was in the exercise of ordinary care at the time of an automobile accident. This includes the presumption of due obser-

vance of deceased of the traffic laws. The presumption is that the deceased did what a prudent man would have done under the circumstances until the accident occurred."

The rule that in the absence of evidence to the contrary it would be presumed that a deceased person was exercising due care has been dealt with by this Court in several cases: *Tuttle vs. PIE*, 242 Pac. 2d 764, 121 U 418, 121 U 420; *Gibbs vs. Blue Cab*, 249 Pac. 2d 213, 122 U 312; *Mecham vs. Allen*, 262 Pac. 2d 285, 1 U 2d 79; *Okuda vs. Rose*, 5 Utah 2d 39, 296 Pac. 2d 287.

We conceive the doctrine of those cases to be that a deceased person is presumed to be in the exercise of due care (the presumed fact), which presumption arises from the fact that he has been killed (the basic fact). The presumed fact remains in the case until the party who has the burden of proving the nonexistence of the presumed fact produces prima facie evidence to the contrary. If that burden is not discharged, the presumed fact remains in the case and the court should instruct the jury on it or direct a verdict in accordance with that presumption.

In the *Mecham* case, supra, Justice Wade explains the effect of the presumption as follows:

> "Such a presumption deals only with the burden of going forward with or the production of evidence. The question of whether a prima facie case has been made is the same here as in all other cases — a question for the court and not the jury to determine. It is established

whenever sufficient evidence is produced from which its existence could be reasonably found. Of course it is immaterial which party produces such evidence. If the court concludes that a prima facie case has been made it should submit the question of the existence of the presumed fact to the jury on the evidence without commenting on or mentioning to them that there was or is such a presumption. If the court concludes that no prima facie showing of the non-existence of the presumed facts has been made he should direct the jury to assume the existence of the presumed facts, or if such facts are determinative of the whole case he should direct a verdict in accordance therewith."

Actually as was pointed out in *Okuda vs. Rose,* supra, this is simply to say that the person who charges negligence on the part of another has the burden of proving such negligence by a preponderance of the evidence. In the *Okuda* case the question was whether or not the plaintiff who was deceased was guilty of contributory negligence and an instruction on the presumption that she was exercising due care was not given. The court said:

"As to the first point on appeal plaintiffs were not entitled to instruction that the decedent was presumed to be acting with due care for her own safety. The trial court instructed that the defendant had the burden of proving his affirmative assertion of contributory negligence by a preponderance of the evidence, and it has been indicated that there is no need to give an instruction to emphasize the burden of going forward with the evidence where defen-

dant also has the burden of persuasion as here."

The courts have formulated the rule that negligence is never to be presumed but must be established, and until established by competent evidence the jury has no function to perform, *Goheen vs. Graber*, 309 Pac. 2d 636 (Kansas). It has also been held that it is not within the jury's province to indulge in mere speculation or conjecture with respect to the issue of negligence, and a verdict cannot be predicted on mere speculation or conjecture respecting the vital issue, *Modelin vs. Consumers Coop Association*, 241 Pac. 2d 693 (Kansas). The case particularly in point is *Aagard vs. Dayton & Miller Red-E-Mix Concrete Company*, 12 Utah 2d 34, 361 Pac. 2d 582. In this case the facts were as stated in the case:

> "Plaintiff's sheep truck was traveling westerly down the canyon; and defendant's cement truck was traveling easterly up it, although the road from both directions is slightly downgrade approaching the underpass. Plaintiff's driver, Clifford Bloomquist, testified that as he neared the underpass he saw the cement truck coming about 200 feet away, astride the center line, but that as it came on it appeared to be moving back toward its side of the highway; while the defendant, Thomas Cook, driver of the cement truck, admits that the sheep truck appeared to be on its own side when he first observed it, and does not claim to have seen it over the center line. He said he realized the trucks were going to be close as they passed but did not expect any collision.

> "The trucks were not afoul each other as their front portions passed. The defendant's rear view mirror, which extends just beyond the width of the cement truck on the driver's side, was not touched. But the trucks apparently came closer together as they continued passing each other because from about half way back the paint on the cement truck was scraped by the rack of the sheep truck."

The case was tried to the court without a jury, who rendered a judgment for defendant. The plaintiff appealed attacking the findings of judgment as being against the evidence. The court held:

> "Even if the plaintiff is correct in arguing that certain aspects of the evidence tend to favor his claim that his driver was in the right, that is not enough to justify upsetting the judgment. As plaintiff he had the burden of proving his right to recover by a preponderance of the evidence."

There is an annotation on the sufficiency of evidence, in the absence of survivors or of eye witnesses competent to testify, as to the place or point of impact of motor vehicles going in opposite directions and involved in a collision in 77 ALR 2d at page 576. A review of the annotation discloses that such evidence in and of itself has been held sufficient to sustain a verdict in some cases and insufficient in other cases. A reading of those cases will illustrate that all the courts agree that there must be sufficient circumstantial evidence to support a verdict and that each case can be distinguished by the physical evidence

found in that particular case. For the reason that in none of those cases is the physical evidence the same as in this case, we see no point in burdening the court with an analysis of each particular case. The rule by which the evidence should be measured is set out in *Bokhoven vs. Hull*, 1956, 247 Iowa 604, 75 N.W. 2d 225, cited on page 582 of the annotation, where it was held:

> "That circumstantial evidence need not be so clear as to exclude every possibility other than the one relied upon, but must be clear enough to make that theory more reasonably probable than any other hypothesis based on the evidence."

In the case which we are considering there is no evidence other than the damage to the vehicles, the highway itself, and the marks found upon the highway. All of the marks found on the highway are on the defendant's side of the road with the exception of the mark made by the rear wheel of the Volkswagen automobile which begins one foot seven inches to the west of the white line and then extends across the white line onto the east side of the road and off to where the Volkswagen came to rest. Plaintiff will probably claim that that mark alone is sufficient evidence upon which to base a verdict, contending that that mark was made by the Volkswagen at the moment of impact as the Volkswagen was pushed off of the highway by the Chevrolet automobile. An analysis of all the marks on the highway and the physical damage to both of the automobiles will show that the

Volkswagen automobile could not possibly have made the mark on the highway found at points 1 and 6 and have made the mark running from point 2 to 3 at the same time. Both of the police officers who were called by the plaintiff and who have some degree of expertness in investigating accidents were of the opinion that the marks at point 1 and point 6 of the diagram (Exhibit 5) and the photograph (Exhibit 6) were made by the Volkswagen automobile as it was forced onto the pavement at the time of impact, and that the mark found at point 2 and running to point 3 was made by the Volkswagen automobile after the impact and after the Volkswagen automobile had swung around in a 180° circle where the back wheels came to rest upon the pavement. No one except plaintiff's attorney ever hypothecated that the mark found at point 2 and extending to point 3 was made at the time of impact. So it is seen under the tests which we have previously set out that the plaintiff's theory of causation is not the more reasonably probable but in the opinion of one of the investigating officers considering all of the physical evidence is impossible.

The opinion of the only officer who was ever asked the question as to whether or not the Volkswagen automobile got onto the wrong side of the road was that it did not. What we then have is an impact between two automobiles which it appears were traveling in opposite directions, which occurred near the white line down the center of the highway. The Chevrolet or DeMille automobile at that point was 3½ to

4 feet onto the wrong side of the road. The Spendlove or Volkswagen automobile was at the least two inches from the center of the white line onto its own side of the road. From this the only inference that can be made is that Terry DeMille was partially onto the wrong side of the road at the time of the accident and that this was a proximate cause of the collision. It cannot be presumed from this evidence alone that either of the vehicles were traveling in excess of the speed limit or at an unreasonably high rate of speed. It cannot be presumed from this evidence that they should have seen one another in time to avoid the accident. It cannot be inferred from this evidence that they had a reasonable opportunity to take some evasive action to avoid the accident. As will be illustrated further on in our argument, both parties could have been observing a proper lookout, driving at a reasonable rate of speed with their cars under reasonable control, and this accident nevertheless have happened. It, therefore, appears that there was simply no competent evidence on which the lower court could submit the question of negligence on the part of Frederick Kenneth Spendlove to the jury since there was no evidence from which a jury could infer negligence on his part.

That the court committed further error in the manner in which it submitted this case to the jury is the substance of Point II. of the argument of this brief.

POINT II

THE COURT ERRED IN GIVING ITS INSTRUCTION NO. 24 PERTAINING TO NEGLIGENCE

As pointed out in our argument under Point I, the only established fact in this case relative to the conduct of the drivers of the vehicles is that the collision between the two vehicles occurred at or near the white line down the highway on Spendlove's side of the road. The court nevertheless gave its Instruction No. 24 pertaining to negligence on the part of the defendant to which the defendant duly accepted (TR. 253). Said instruction reads as follows:

"Instruction No. 24

"It was the duty of the decedent Frederick Kenneth Spendlove to use reasonable care under the circumstances in driving his car to avoid danger to himself and others and to observe and be aware of the condition of the highway, the traffic thereon, and other existing conditions; in that regard, he was obligated:

"A. To use reasonable care to keep a lookout for other vehicles and obstacles or other conditions reasonably to be anticipated.

"B. To keep his car under reasonably safe and proper control.

"C. Upon a laned highway to drive as nearly as practicable entirely within a single lane and not to move from one lane to another until the driver has first ascertained that he can do so with reasonable safety.

"D. To drive his automobile on his own right side that is, the east side of the highway.

"E. To keep a lookout for persons and other vehicles upon the highway, and whenever it appears to be reasonably necessary in the exercise of due care for the safety of himself or others, to turn his vehicle to the outside of the highway to avoid a collision.

"Failure of the said Frederick Kenneth Spendlove to operate his automobile in accordance with the foregoing requirements of the law would constitute negligence on his part."

Under this Instruction the jury were at liberty to find negligence on the part of Frederick Kenneth Spendlove on any one or more of five grounds: First, they might return a verdict against his estate if he failed to maintain a proper lookout; second, if he failed to keep his car under reasonably safe and proper control (whatever that means); third, if they found he was traveling upon a laned highway (which he was not) and did not drive as nearly as practicable entirely within a single lane and did move from one lane to another without first ascertaining that he could do so with reasonable safety; fourth, that he drove his automobile onto the wrong side of the road; and fifth, that he failed to turn his vehicle to the outside of a highway to avoid a collision. The jury could have easily have been sufficiently impressed with the instruction to believe that there was evidence in the record from which they could find that Frederick Kenneth Spendlove was negligent in one or more of the ways mentioned. They would be entitled to assume that there must have been evidence in the record or the court would not have given the instruction. It

is for these reasons that courts have declared that such abstractions constitute reversible error.

See *Corpus Juris Secundum, Trial, Section* 379, *Volume* 88.

> "Instructions should be concrete and specific as possible with respect to the facts and issues of the case, and not general or abstract, and it is improper to give an instruction announcing a naked legal proposition, however correct it may be, unless it bears on, and is connected with the issues involved, and unless, further there has been some competent evidence to which the jury may apply it."

This statement of law is further developed in succeeding sections in that volume and is supported by many cases.

In *Hadley vs. Wood,* 345 Pac. 2d 197, 9 Utah 2d 336, an action for personal injuries sustained by the plaintiff when a sleigh upon which he was riding slid into the path of defendant's automobile, this court said:

> "In the second place an instruction may be entirely accurate as a general statement of law and yet be erroneous if applied to special fact situations . . . It is not the function of the court to recite to the jury propositions of law in the abstract, however accurate or even interesting they may be. It is worse than idle to do so. By including irrelevancies the process could go on interminably with the result not only of boring but likely of confusing the jury. It seems hardly necessary to reiterate the idea also included

> in the preface to JIFU, '. . . the fewer instructions given, the better . . . no instruction should be given unless it is both necessary and applicable to the fact situation at hand'."

It is also well settled that the court may not permit the jury to speculate upon the evidence and that a finding of fact cannot be based upon surmise, conjecture, guess or speculation, *Jackson vs. Colston*, 116 Utah 205, 209 Pac. 2d 566; *Dern Investment Company vs. Carbon County Land Company*, 94 Utah 76, 75 Pac. 2d 660.

The general proposition that it is prejudicial error for a trial court to give instructions on matters extraneous to the issues and evidence of the case notwithstanding that such instructions may correctly state the law has been stated in numerous cases by this court. In that connection see *Shields vs. Utah Light and Traction Company*, 99 Utah 307, 105 Pac. 2d 347; *Parker vs. Bamberger*, 100 Utah 361, 116 Pac. 2d 425; *Morrison vs. Perry*, 104 Utah 151, 140 Pac. 2d 772; *Corey vs. Southern Pacific Company*, 119 Utah 1, 223 Pac. 2d 819; *Olson vs. Warwod*, 123 Utah 111, 225 Pac. 2d 725; *Moore vs. Denver and Rio Grande Western Railroad*, 292 Pac. 2d 849, 4 Utah 2d 255; and *Johnson vs. Maynard*, 9 Utah 2d 268, 342 Pac. 2d 984.

In the case of *Morrison vs. Perry*, supra, the defendant was driving from Deweyville which is on the highway north of Ogden to Ogden. As they approached the scene of the accident about 7:00 o'clock a.m.

it was light and visibility was good and defendant was proceeding at 35 to 40 miles per hour. As his car approached the point where the main and old highway separate, he saw the deceased's car approaching from the south on the main highway but could not tell on which side of the road he was until they were within 225 feet of each other at which time they noticed the deceased was on the wrong side of the highway on the inside of a curve headed toward the right side of defendant's automobile. The defendant immediately swung his car to the left and applied his brakes. At the same instant the deceased swung his car to the right. Defendant's car had almost come to a stop when the collision occurred near the edge of the hard surface of the old highway on defendant's left hand side and near the point of divergence of the highways. Both cars were travelling at about the same rate of speed. The complaint was made of the instructions and the trial court said, on page 776 of the Pacific Reporter:

> "The trial court instructed a jury on all the alleged grounds of negligence set forth in plaintiff's complaint. One of the grounds was that the defendant drove his car 'without having it under immediate control, so he could stop it within the range of his vision.' The court should not have submitted this issue to the jury where there was no evidence to support it and it was not applicable in this case."

In the case of *Johnson vs. Maynard,* supra, it was held in an action for injuries suffered by the plaintiff when her automobile was struck by an of-

ficial police vehicle, driven by the defendant, in an intersection in the downtown business area that in the absence of a showing (1) that plaintiff had been aware of particular dangers involved in approach of defendant's vehicle and (2) that, having such knowledge, she had nevertheless assumed the risk of such danger and proceeded, had rendered the doctrine of assumption of risk inapplicable; and held that error in instructing on that doctrine would require reversal, since jury could have believed from instruction that plaintiff would be barred from recovery by assumption of risk even if she had exercised due care under the circumstances.

In the case of *Shields vs. Utah Light and Traction Company*, supra, the court read the pleadings to the jury as part of the instructions. In sub-paragraph 9 of the instruction the jury was advised (by way of setting forth just what plaintiff contended the facts showed) that at the time of his death (as a result of the action in question) "He was an employee of the Tooele Valley Railway Company in Salt Lake City, Utah, and was earning a salary of $77.50 a month and was promised by said employer, and upon said promises it is therefore alleges that his salary would rapidly increase until he would be earning approximately $200.00 per month." The court held:

> "We conclude that the reading of the long and involved Complaint to the jury as part of the charge was error not altogether corrected by the mere admonition that the foregoing is not

to be considered as evidence but merely sets forth the claims of the plaintiff. Likewise, setting forth the plaintiff's theory in Instruction 1, that the deceased would soon have been earning $200.00 per month, was error for the reason that there was no evidence offered to support such allegation."

For the jury to find in this case that Frederick Kenneth Spendlove was not keeping a proper lookout prior to the time of the collision, the jury would have to assume that the DeMille automobile drove down the highway on the wrong side of the road or in a manner otherwise constituting a threat to Kenneth Spendlove for a sufficient length of time for Frederick Kenneth Spendlove to have seen the vehicle and appraise the situation, and then to have done something about it. For the jury to have found that Spendlove was negligent for failing to turn his vehicle to the outside of the highway to avoid a collision assumes first of all that he saw the car or should have seen the car approaching him on the wrong side of the highway for a sufficient length of time to have done something about it, but also that that car was during that period of time approaching in such a manner as to have made a turn to the outside of the highway advisable. The charge that Frederick Kenneth Spendlove may have been negligent if he failed to keep his car under reasonably safe and proper control presumes that he had an opportunity to avoid the accident and could have avoided it had his car been under reasonably safe and proper control. We have

already pointed out that there was no evidence that Spendlove drove his car on the wrong side of the road which would make this part of the instruction inapplicable. It is much more probable, unless we want to assume the drivers wanted to commit suicide, that the DeMille automobile came over onto the wrong side of the highway suddenly — perhaps he turned out to pass a car or some such thing — and there was nothing either driver could do at that point. The point we are trying to make is illustrated by the case of *Baumler vs. Hazelwood* (Texas, 1961) 347 S.W. 2d 560. This was a wrongful death action arising out of a head-on collision on an open highway. In the words of the court:

> "The accident occurred about 1:30 a.m. on Sunday morning. The night was clear and bright. There was a moon. The highway, U.S. Highway 77, was a concrete two-lane highway with a white line painted down the center and clearly visible. At the point of collision, the highway was smooth, straight, and level. There were gravel shoulders 6 or 8 feet wide leading into ditches on both sides of the highway. The highway runs north and south.
>
> "Baumler was driving north from Dallas in the east lane of the highway. Hazelwood, accompanied by a female companion, was driving in the opposite direction, i.e., south toward Dallas. Their cars collided, left-front fender to left front fender. Hazelwood was killed instantly. The lady accompanying Hazelwood did not take the witness stand. While Baumler was permitted to testify about other matters,

he was not permitted to testify as to the collision itself. The testimony was excluded by the trial judge because of the provisions of the Dead Man's Statute; i.e., that the accident was a 'transaction with the deceased' under Article 3716, Vernon's Texas Civil Statutes Annotated. The correctness of this ruling is not before us. There were no other eyewitnesses. So the evidence before us consists mainly of the condition of the cars, condition and acts of the parties before and after the collision, pictures taken at the scene, and the evidence left after the crash.

". . . The jury found that Hazelwood failed to keep a proper lookout and failed to have his car under proper control, both of which were negligence and a proximate cause of the collision. It found that Hazelwood did not fail to turn his car to the right immediately before the collision; but it found that immediately prior to the collision, Hazelwood drove and operated his car so that a portion thereof extended to his left-hand side of the center stripe of the highway; and this was negligence and a proximate cause. Those findings are not attacked.

"The jury found that Baumler did not fail to keep a proper lookout; did not fail to keep his car under proper control; and did not drive or operate his car on his left-hand side of the center line. It found, however, that he was driving his car at a greater rate of speed than a person of ordinary care and prudence would have driven under the circumstances; and that this was a proximate cause of the collision. It also found that Baumler failed to turn his car to the right immediately before the collision;

and that this was negligence and a proximate cause.

". . . As set out above, the jury found that Hazelwood drove his car over into Baumler's side of the road. It also found that Baumler did not drive on the wrong side of the road. But there is no evidence as to how far the two cars were apart when Hazelwood drove onto Baumler's side, and there was no direct evidence of the speed at which the cars were approaching each other. We find no evidence that, including reaction time, Baumler had any opportunity to take evasive action by turning, speeding up, or slowing down. The testimony regarding skid marks or the lack of them need not be repeated except to observe this: there were none according to the testimony of the sheriff's patrolman and other witnesses. There were tire marks 'just before the point of impact' according to Roy Perry. And while Billy Gober said that he did not remember well, he recalled 15 or 20 feet of marks on the east and about 10 feet on the west. Gober did not describe the direction of the skid marks, except that they were on one side or the other of the highway. For that matter he did not testify who made the skid marks.

". . . Under this evidence the jury would have to speculate on the time and distance factors. We find no evidence thereon. The jury found that Baumler kept a proper lookout and had his car under proper control. If, then, Hazelwood suddenly drove onto Baumler's side of the road and there was no time for Baumler to evade him, Baumler would have been hit, and he would have hit Hazelwood, at whatever speed Baumler was traveling."

Instruction 24 is erroneous in yet another regard, and that is that the charge that Frederick Kenneth Spendlove had a duty "upon a laned highway to drive as nearly as practicable entirely within a single lane and not to move from one lane to another until the driver has first ascertained that he can do so with reasonable safety" was not applicable unless we consider this a laned highway. If we did consider it a laned highway, then the charge that Frederick Kenneth Spendlove had a duty to "drive his automobile on his own right side that is, the east side of the highway" was not necessary. The instruction is confusing and therefore prejudicial in that it implies that Kenneth Spendlove might have driven his automobile on his own right side of the highway and not be negligent under paragraph D of the instruction and yet in some manner be negligent under paragraph C. It is not surprising that the jury returned a verdict in the plaintiff's favor in the action brought for the death of Connie Spendlove. Having been instructed as they were in Instruction 24 in spite of the lack of evidence of negligence on the part of Kenneth Spendlove given a choice of five ways in which they might find Spendlove negligent would have required a great deal of astuteness on their part to determine that at least four of the charges of negligence did not pertain to and had nothing to do with this accident. For the reasons given, we feel the court committed prejudicial error in giving Instruction No. 24 especially when that instruction was immediately

followed by Instruction No. 24(A) which incorporated 24 and said:

> "Before you can return a verdict for the plaintiff because of the death of Connie DeMille, you must find by a preponderance of the evidence that each of the following two propositions are true:
>
> "A. That the defendant's decedent Mr. Spendlove was negligent in the operation of the automobile he was driving at the time and place of the said collision in one or more of the particulars as mentioned herein above.
>
> "B. That such negligence of Mr. Spendlove, if any, was the proximate cause of said collision.
>
> "In this connection you are instructed that plaintiff has the burden of proving each of the above and foregoing propositions by such preponderance of the evidence."

CONCLUSION

All of the persons involved in this accident were killed. There was no evidence as to how the accident had occurred except that it is known that the DeMilles were on their way to Las Vegas, the damage to the two automobiles in question, and the physical marks left on the highway at or after the point of impact. On the basis of this evidence it is reasonable to infer that this was a head-on collision between the DeMille vehicle, which was traveling south, and the Spendlove vehicle, which would have to be traveling north, and that the accident occurred by reason of the

fact that the DeMille vehicle was 3½ to 4 feet onto the wrong side of the road at the time of impact. There is no evidence whatsoever as to what happened up to the time of impact. There is no evidence that Frederick Kenneth Spendlove ever drove his automobile onto the wrong side of the highway. There is no evidence that the drivers were traveling at an excessive rate of speed; did not have their automobiles under control; or that Frederick Kenneth Spendlove could have avoided the accident by turning his automobile to the right. Under such circumstances it was error on the part of the court to deny the appellant's motion for a directed verdict. The plaintiff had failed to sustain his burden of proving negligence on the part of Frederick Kenneth Spendlove, who being dead is presumed to have been exercising due care, by a preponderance of the evidence. Nevertheless, the court submitted the case to the jury specifying five grounds of negligence. Under that instruction the jury were asked to speculate as to whether or not Frederick Kenneth Spendlove was keeping a reasonable lookout, keeping his car under reasonable control, driving on the wrong side of the road, or could have turned to the right and avoided the accident. There being no evidence in the case from which such inferences could be made, it was error on the part of the trial court to so instruct the jury. Since the plaintiff did fail to sustain his burden of proof as to negligence on the part of Frederick Kenneth Spendlove, the judgment of the trial court should be reversed and

judgment entered in the appellant's favor. The least which this court should do in order to correct this manifest miscarriage of justice is to grant appellant a new trial.

Respectfully submitted,

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